

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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WISCONSIN RESOURCES PROTECTION  
COUNCIL, CENTER FOR BIOLOGICAL  
DIVERSITY and LAURA GAUGER,

Plaintiffs,

v.

FLAMBEAU MINING COMPANY,

Defendant.

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ORDER

11-cv-45-bbc

Having read and considered plaintiffs' motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment, I am denying it. Plaintiffs have not shown that they are entitled to an award of fees and costs as prevailing parties under § 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d). Plaintiffs may recover only those costs allowed under Fed. R. Civ. P. 54(d)(1)) for their work in this case.

Plaintiffs emphasize the "favorable legal findings" by the court at summary judgment to the effect that defendant had been discharging a pollutant (copper) from its biofilter, that Stream C south of Copper Park Lane is a "water of the United States" within the meaning of the Clean Water Act and that defendant was not authorized to discharge copper by a valid NPDES permit because the regulation it relied upon for its permit shield defense was never approved by the United States Environmental Protection Agency as part of Wisconsin's

NPDES permit program. Technically, plaintiffs are correct. The findings were made. However, their significance is minuscule. As I found in the July 24 order, the amount of copper discharged from defendant's biofilter never affected the quality of the Flambeau River. Although Stream C is legally a water of the United States and it is possible that pollution discharges from the biofilter washed through the stream and eventually reached the Flambeau, any pollution measured in the stream was de minimis and never affected the quality of the river. Finally, although it was a violation of the NPDES permit program for the Wisconsin Department of Natural Resources to supervise defendant under the mining permit, it is clear that the DNR preferred to operate under the mining permit because it allowed it to monitor defendant's discharges more frequently and with more experienced staff than the NPDES permit would have allowed.

Plaintiffs overstate the value of the legal findings in their favor. In reality, they achieved no victory of any significance from their suit.

## ORDER

IT IS ORDERED that the motion of plaintiffs Wisconsin Resource Protection Council, Center for Biological Diversity and Laura Gauger to alter or amend the judgment denying them an award of attorney fees and costs under § 33 U.S.C. § 1365(d) is DENIED.

Plaintiffs may recover only the costs allowed under Fed. R. Civ. P. 54(d)(1).

Entered this 28th day of September, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge